Lim Kar Bee v Duofortis Properties (M) Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-501-91
HARUN HASHIM, MOHAMED AZMI AND PEH SWEE CHIN SCJJ
13 JUNE 1992

Contract *— Illegality — Agreement for sale and purchase of land — Trust deed — Scheme to avoid estate duty — Whether an illegal purpose — Test to be applied — Estate Duty Enactment 1941 s 11(i) — Contracts Act 1950 s 24*

In this case a scheme was devised whereby the appellant, the registered owner of some valuable land in Penang, agreed to sell the land to a company and also executed a trust deed declaring that he held the land in trust for the company. The said company was incorporated together with another company, Lim Kar Bee & Sons Sdn Bhd, the holding company, and were formed in pursuance of a scheme devised by a tax consultant to avoid payment of estate duty payable in regard to the said land if the appellant/landowner died. In the original application before the High Court the issues that were raised and contested were that the various documents prepared, though signed by the appellant, were not explained to him; that there was misrepresentation by his daughter and that there was also undue influence. In respect of these issues, the learned trial judge came to conclusions against the appellant and granted the order as prayed in the originating summons. The appellant appealed and raised the question of illegality for the first time.

Held, allowing the appeal:

(1) When the contract is not ex facie illegal, the court can still take judicial notice of illegality and refuse to enforce the contract even though illegality has not been pleaded but only in the situation when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality. Such a situation exists in this appeal.

(2) The real test to be applied in any given transaction seems to be whether the primary purpose of the transaction is to avoid tax; if it is, it is an illegal purpose, that is, of such a nature that, if permitted, it would defeat the tax law in question, coming under s 24(b) of the Contracts Act 1950.

(3) The primary purpose of the scheme in this case was to avoid paying estate duty, especially bearing in mind that the said land would practically remain with members of the immediate family of the appellant/landowner in the sense that the children and the wife of the appellant/landowner would control exclusively the holding company without their having paid one cent towards the purchase price of the said land. The scheme was therefore illegal. The agreement of sale and purchase of the said land and the subsequent trust deed were therefore unenforceable.

[Bahasa Malaysia summary

Di dalam kes ini suatu skim telah direka yang dengannya perayu, tuan punya berdaftar tanah yang berharga di Pulau Pinang, telah bersetuju menjual tanah itu kepada sebuah syarikat dan telah juga menyempurnakan suatu suratikatan amanah mengumumkan bahawa beliau memegang tanah itu dalam amanah untuk syarikat itu. Syarikat itu telah diperbadankan bersama dengan satu lagi syarikat, Lim Kar Bee & Sons Sdn Bhd, iaitu syarikat pemegang, dan telah ditubuhkan dalam menjalankan skim yang direka oleh pakar runding cukai untuk mengelak daripada pembayaran duti harta pusaka yang kena dibayar berhubung dengan tanah itu jika perayu/pemilik tanah itu mati. Di dalam permohonan asal di hadapan Mahkamah Tinggi isu-isu yang ditimbulkan dan dipertikaikan ialah bahawa dokumen-dokumen yang disediakan sungguhpun ditandatangani oleh perayu tidak diterangkan kepadanya; bahawa terdapat salah nyataan oleh anak perempuannya dan bahawa terdapat juga pengaruh tak wajar. Dari segi isu-isu itu, hakim yang arif telah membuat kesimpulan terhadap perayu dan memberi perintah seperti yang dipohon di dalam saman pemula itu. Perayu telah merayu dan menimbulkan soal kepenyalahan undang-undang buat pertama kalinya.

Diputuskan, membenarkan rayuan itu:

(1) Apabila kontrak itu tidak ex facie menyalahi undang-undang, mahkamah masih boleh mengambil pengiktirafan kehakiman dan menolak untuk menguatkuasakan kontrak itu walaupun kepenyalahan undang-undang tidak dijadikan pli tetapi hanya dalam situasi di mana fakta-fakta yang tidak dijadikan pli muncul dalam keterangan semasa perbicaraan menunjukkan dengan jelas kepenyalahan undang-undang itu. Situasi tersebut wujud di dalam rayuan ini.

(2) Ujian yang sebenar yang patut digunakan di dalam sebarang transaksi tertentu nampaknya ialah sama ada maksud utama transaksi itu untuk mengelak cukai; jika itu benar, ia adalah maksud yang menyalahi undang-undang, yakni bersifat sedemikian yang jika dibenarkan ia akan menggagalkan undang-undang cukai yang berkenaan, dan termasuk di bawah s 24(b) Akta Kontrak 1950.

(3) Maksud utama skim di dalam kes ini ialah untuk mengelak membayar duti harta pusaka, terutama sekali memandangkan bahawa tanah itu boleh dikatakan tetap bersama ahli keluarga terdekat perayu/pemilik tanah itu dalam erti yang anak-anak dan isteri perayu/pemilik tanah itu akan menguasai secara eksklusif syarikat pemegang itu, tanpa mereka membayar satu sen pun untuk harga membeli tanah itu. Oleh kerana itu skim itu adalah menyalahi undang-undang. Perjanjian jual-beli tanah itu dan suratikatan amanah yang kemudiannya oleh itu tidak boleh dikuatkuasakan.]

Cases referred to

1 *Palaniappa Chettiar v Arunasalam Chettiar* [1962] MLJ 143 (refd)
2 *Leong Poh Chin v Chin Thin Sin* [1959] MLJ 246 (refd)
3 *North Western Salt Co Ltd v Electrolytic Alkali Co Ltd* [1914] AC 461 (refd)
4 *Commissioners of Inland Revenue v Duke of Westminster* [1936] AC 1 (refd)
5 *Latilla v Inland Revenue Commissioners* [1943] AC 377 (refd)
6 *Alexander v Rayson* [1936] 1 KB 169 (refd)
7 *Gilford Motor Co Ltd v Horne* [1933] Ch 935 (refd)
8 *Jones v Lipman* [1962] 1 WLR 832; [1962] 1 All ER 442 (refd)

Legislation referred to

Contracts Act 1950 s 24
Estate Duty Enactment 1941 s 11(i)

Appeal from: Civil Suit No 24 (31)–321–87 (High Court, Penang)

Cecil Abraham (*JA Yeoh* with him) (*Shearn Delamore & Co*) for the appellant.

Choong Pee Choy (*Choong & Co*) for the respondent.

Cur Adv Vult

Peh Swee Chin SCJ (delivering the judgment of the court): The appellant/defendant has been at all material times and still is the registered owner of some valuable land at Batu Ferringhi, Penang (the appellant is hereinafter called 'the landowner' and the land, 'the said land'). The plaintiff company has been at all material times, a company registered under the Companies Act 1965 (hereinafter called 'the prospective transferee').

The prospective transferee filed the originating summons herein, on the face of it, for the construction of a trust deed dated 26 April 1985 and for a subsequent order to transfer the said land to the prospective transferee in pursuance thereof.

The trust deed is set out below:

> This declaration of trust is made the 26th day of April 1985 by Lim Kar Bee (NRIC No 1341996) of No 515-M, Jalan Hashim, Tanjong Bungah, Penang (hereinafter called 'the trustee').
>
> Whereas by an agreement of sale dated 1 April 1985 made between the trustee as vendor of the one part and Duofortis Properties Sdn Bhd, a company incorporated in Malaysia and having its registered office at Suite 302-A, Penang Plaza, Burma Road, Penang, as purchaser of the other part, the vendor sold and the purchaser purchased all those four (4) pieces of land known as Lot Nos 370, 371, 372 and 373, Town of Batu Ferringhi, Section 2, North East District, Penang (hereinafter called 'the lands') subject to the two existing charges to Ban Hin Lee Bank Bhd vide Presentation No 5917/81 Jilid 210 Folio 66 and Presentation No 5918/81 Jilid No 210 Folio 67 to secure overdraft facilities to the extent of $1,000,000 for use by Lim Kar Bee & Sons Sdn Bhd (hereinafter called 'the charges').

And whereas the full purchase price of $18,970,000 has been paid by the purchaser to the trustee.

And whereas pending the discharge of the said charges the said lands may not be transferred to the said purchaser.

Now this deed witnesseth as follows:

1 The trustee hereby declares that he holds the said lands in trust for the said purchaser, Duofortis Properties Sdn Bhd, and hereby agrees that he will at the request and costs of the said Duofortis Properties Sdn Bhd execute all documents and do all acts and things as may be necessary to effect the transfer and registration of the said lands in the said purchaser's name.

2 The trustee shall during the subsistence of the trust herein collect, and receive the rents, profits and income arising thereon for the benefit of the purchaser.

In witness whereof the trustee hereto has hereunto set his hand and seal the day and year first above written.

Signed and sealed and delivered)
by the trustee, the aforesaid)
Lim Kar Bee in the presence of:)

Sgd
Gan Teik Chee,
Advocate & Solicitor, Penang

The agreement of sale of the said land dated 1 April 1984 and referred to herein, and the basis of the trust deed is set out below:

An agreement is made the 1st day of April 1985 between Lim Kar Bee (NRIC No 1341996) of No 515-M, Jalan Hashim, Tanjong Bungah, Penang (hereinafter called 'the vendor') of the one part and Duofortis Properties Sdn Bhd, a company incorporated in Malaysia and having its registered office at Suite No 302-A, Penang Plaza, Burma Road, Penang (hereinafter called 'the purchaser') of the other part.

It is hereby agreed as follows:

1 Subject to the stipulations herein contained the vendor will sell and the purchaser will purchase the land and hereditaments more particularly described in the Schedule hereto (hereinafter called 'the said property').

2 The purchase price shall be the sum of ringgit eighteen million nine hundred and seventy thousand only ($18,970,000) of which the said sum is now paid by the purchaser to the vendor (the receipt of which sum the vendor hereby acknowledges).

The sale and purchase shall be subject to:

(a) the vendor deducing a good marketable and registrable title to the said property;
(b) the said property being freehold land;
(c) any defect in title to be rectified and perfected by the vendor at his own expense;
(d) production to the purchaser of all documents of title in the possession of the vendor;
(e) vacant possession;
(f) the purchasers shall accept the said property subject to the two existing charges by Lim Kar Bee to Ban Hin Lee Bank Bhd vide Presentation

A No 5917/81 Jilid 210 Folio 66 and Presentation No 5918/81 Jilid 210 Folio 67 to secure overdraft facilities to the extent of $1,000,000 for use by Lim Kar Bee & Sons Sdn Bhd.

4 The completion of the purchase shall take place at the office of M/s Gan Teik Chee & Ho of 3rd Floor, Wisma MLS, No 32, Penang Street, Penang.

B 5 Upon payment of the purchase price within the time stipulated in cl 4 hereof the vendor shall execute a registrable transfer of the said property in favour of the purchaser or his nominee(s), such transfer shall be prepared and perfected at the expense of the purchaser. The purchaser shall bear all solicitors' charges.

6 As from the date of this agreement the purchaser shall be entitled to
C possession of the said property and to the rent and profits thereof and shall likewise from such date be liable to pay the quit rent assessment rates and other outgoings payable thereon, such rents and profits and outgoings to be apportioned if necessary.

7 The vendor shall be responsible for the payment of the real property gains tax and M/s Gan Teik Chee & Ho shall be authorized to retain from the
D balance purchase price a sum of $ towards the payment of the said tax. Upon receipt of a notice of assessment from the Director General of the real property gains tax, M/s Gan Teik Chee & Ho shall use the said retention sum towards the payment of the said tax and any balance shall be paid to the vendor. If the said tax shall exceed the retention sum then the vendor shall pay the difference.

E 8 The vendor hereby declares that the land and hereditaments sold herein is not subject to acquisition by the government or other acquiring authority and the purchaser shall not raise any objection or requisition in this regard. If the land and hereditaments sold shall have been subject to acquisition by the government under ss 4 or 8 of the Land Acquisition Act 1960 at the date of this agreement, then the vendor shall refund the deposit paid to account
F of the purchase price to the purchaser without interests costs or damages and this agreement shall be treated as cancelled and no action shall be taken by either party against the other.

9 The said property has been and is open to inspection and the purchaser shall be held to have had notice of all notices and requirements of government and local authorities, and all such notices and requirements shall be com-
G plied with by the purchaser at his own expense. The said property is likewise sold subject to any road widening, drainage improvement or other schemes whatsoever affecting the said property and the purchaser shall be deemed to have full knowledge of the nature and effect thereof and shall make no objection or requisition in respect thereof.

10 The purchaser shall be entitled to specific performance of the purchase herein.

H 11 Any notice or demand required to be given or made to either party shall be in writing and shall be sufficiently served if the same is sent by registered post to his or her address herein stated or at his or her last known address in the states of Peninsular Malaysia and shall be deemed to have been received by him or her on the day following the date on which it was posted.

12 In this agreement where the context so admits:

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(a) the expression 'the vendor' includes the personal representatives heirs and assigns if it is a person and the successors and assigns if it is a company;

(b) the expression 'the purchaser' includes the personal representatives heirs and assigns if it is a person and the successors and assigns if it is a company;
(c) words importing the masculine gender only include the feminine and neuter genders;
(d) words importing the singular number only include the plural.

In witness whereof the parties hereto have hereunto set their hands the day and year first above written.

The schedule above referred to

All that four (4) pieces of land and hereditament situate in the North East District, Penang known as Lot Nos 370, 371, 372 and 373, Bandar Batu Ferringhi, Sek 2, Penang comprised in Grant Nos 6770, 6771, 6772 and 6773 respectively.

Signed by the vendor)
in the presence of:)
Sgd
Advocate & Solicitor
Penang

Signed by the purchaser)
in the presence of:)
Sgd
Advocate & Solicitor
Penang

By consent, the originating summons proceeded as an action as if it had been begun by writ and the matter was subsequently continued by evidence viva voce with the High Court at its conclusion giving judgment as prayed to the prospective transferee, and from that judgment the landowner has appealed. Judgment of this court was reserved for further consideration and we now give our judgment.

In the initial supporting affidavit of the originating summons herein and her evidence in court by Lim Suan Sim (f) (PW1), the prospective transferee was incorporated together with another company for the express purpose of avoiding payment of estate duty, the other company being Lim Kar Bee & Sons Sdn Bhd (hereinafter called 'the holding company'). The two companies were formed in pursuance of a scheme devised by a tax consultant to avoid payment of estate duty payable in regard to the said land should the landowner die.

The said scheme to avoid paying estate duty was referred to very often in evidence as estate duty planning scheme which involved a series of transactions, fairly complex and intricate but understandable.

It would not be essential for the purpose of our judgment, to set out the steps and documents one by one designed to achieve the purpose of avoiding the payment of estate duty except in a way as brief as possible. By the agreement of sale, the landowner was supposed to have sold the said land to the prospective transferee for $18,970,000 in consideration of allotment of shares to the holding company of 18,970,000 shares at par value of $1 each in the prospective transferee, with the holding company holding the equity of the prospective transferee (ie the plaintiff company)

A and with the landowner recorded to have been owed $18,970,000 by the holding company in the books of the holding company. Then 1,355,000 *ordinary* shares of $1 each in the equity of the holding company were acquired by the landowner at the price with a premium of $13 per share for a total value of $18,970,000 from the holding company, setting off against such price the indebtedness to the landowner in the books of the holding B company in the said sum of $18,970,000 which was the original purchase price of the said land as set out in the sale agreement of the said land. After that, the holding company would then convene an extraordinary general meeting to convert the said 1,355,000 *ordinary* shares into non-convertible cumulative *preference* shares at par value of $1 each without voting rights C but preferentially entitled to 2% dividend per year, and the landowner's wife and children would exclusively be given and alloted the *ordinary* shares of the holding company with voting rights.

The whole scheme was devised by the tax consultant firm in question of which PW5 was their manager. According to PW5, it seems that the scheme of avoiding estate duty was basically grounded on these non- D convertible cumulative *preference* shares at par value of $1 each. The minimum value of assets of a deceased person that would attract the payment of estate duty was $2m then. The *ordinary* shares of a company owned by a deceased person would attract duty under the law then applicable, at the rate based on the value of the assets of the company but the value or the par E value of cumulative *preference* shares of $1 each would remain at $1 each by way of valuation for the purpose of assessment of estate duty thereon. In the instant case, the value for estate duty purposes of the 1,355,000 *preference* shares would therefore be less than the minimum value of $2m chargeable with estate duty and therefore none would be payable. PW5, in connection with the special resolution proposed and passed at the general meeting of F the holding company for conversion of 1,355,002 *ordinary* shares at par value of $1 each into non-convertible cumulative *preference* shares at par value of $1 each, said and to quote: 'We were trying to ensure that the scheme would not be challenged by the Inland Revenue Department. We were trying to make this scheme as authentic as possible.'

G Section 11(i) of the Estate Duty Enactment 1941 which was then applicable and in force, but which has now since been repealed, provided as follows:

> Where there pass on the death of any person dying after this Enactment any shares (not being preference shares) in any company to which this Part of this H Enactment applies, then if either —
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> ...
>
> the principal value of those shares for the purposes of estate duty shall not be ascertained in the manner provided by section 20 of this Enactment, but shall be ascertained by reference to the value of the total assets of the company:
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> Provided that in cases falling within paragraph (a) of this subsection, the value I of the total assets of the company shall, for the purposes of this section, be deemed to be reduced by the sum of money therein referred to.

This must be the section which the tax consultants in question had in mind.

The issues that were raised and contested in the court below were that the various documents prepared, though signed by the landowner, were not

explained to the landowner; that there was misrepresentation by PW1, his daughter, and that there was also undue influence. In respect of these issues, the learned judge has dealt with them admirably; he came to conclusions against the landowner and granted the order as prayed in the originating summons.

On appeal before us, inter alia, in the memorandum of appeal of the landowner, its para 7 says:

> The learned trial judge erred in law and in fact in holding that upon the true construction of the trust deed dated 26 April 1985 and in the events which had happened the appellant holds the said lands in trust for the respondents and in so doing failed to appreciate that the shares purportedly issued in pursuance of an alleged estate duty planning scheme towards purported satisfaction of the full purchase price of $18,970,000, if at all admissible for the purpose of construing the said trust deed, which is denied, had not in fact been issued and that if at all issued are illusory shares without consideration or value and a deception on public administration.

This illegality was raised for the first time before us, it not having been raised or pleaded earlier.

Learned counsel for the landowner submitted on this ground. I had enquired of learned counsel for the prospective transferee as to whether the scheme was a deception on public administration as alleged; he said it was not, but did not have any judicial precedents to cite to the court on the validity of such a tax-saving scheme. The prospective transferee maintained that it was a scheme to avoid duty or tax, therefore legal, and not to evade it, which would then otherwise be illegal. The difference between 'avoidance of tax' and 'evasion of tax' was emphasized.

Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is ex facie illegal.

When the contract is not ex facie illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the court can still take judicial notice of illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality, eg the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances, see eg *Palaniappa Chettiar v Arunasalam Chettiar*,[1] *Leong Poh Chin v Chin Thin Sin*,[2] and *North Western Salt Co Ltd v Electrolytic Alkali Ltd*[3] just to mention a few. The existence of such a situation in the instant appeal is warranted by the facts that emerged in evidence, including affidavit evidence.

The various documents designed and employed at the instance of PW5, are ex facie lawful but PW1 and PW5 and others have given evidence in the course of this case showing that all these documents, including the agreement of sale and the trust deed mentioned above had one purpose in common, ie to avoid paying estate duty.

A Is it an illegal purpose? Such evidence of such professed intention to avoid paying estate duty is evidence which tends to contradict or vary the documents prepared and signed, for example, to contradict the sale and purchase agreement of the said land; the agreement purporting to be a bona fide commercial transaction of sale at a fixed price, the receipt of which was
B acknowledged.

Such extrinsic evidence, however, is always admissible to defeat a contract on the ground of illegality even if such extrinsic evidence may vary or contradict the contract. There is no need to look far for the authority for saying so, for our own s 92(a) of the Evidence Act 1950 has seen to it. Although evidence of such intention to avoid paying estate duty, as de-
C clared by the witnesses, is highly relevant for the purpose of considering the question of illegality of contract, let us look as we are obliged to at the circumstances in the case, especially the various documents designed and signed, to see whether they could be correlated to such evidence of intention.

D The ingenuity of PW5 lies in the conversion of 1,355,002 *ordinary* shares at par value of $1 each acquired at a premium of $13 per share in the holding company into non-convertible cumulative *preference* shares at par value of $1 each, bearing in mind that the total cost of each acquisition of the earlier ordinary shares would be equal to the value of the said land, ie the purchase price stated in the agreement of sale. The whole scheme was
E tailor-made to produce the net result that if the landowner had passed away immediately after all the scheme documents were signed, not one cent would be payable as estate duty.

The justification for declaring such intention in oral evidence or in affidavit to avoid paying estate duty and for the various documents to be drawn up and signed seems to be that they were 'avoiding' estate duty and
F not 'evading' the same, so that their scheme must be legal. Is this contention tenable?

While the words 'tax evasion' no doubt suggest illegality, the words 'tax avoidance' do not necessarily indicate an unassailable hallmark of legitimacy as seemingly contended by the prospective transferee. PW1 and PW5
G openly used the expression of tax avoidance as if by its recitation, the scheme in question would be or become legitimate thereby ipso facto. The expression could have been possibly derived from a dictum of Lord Tomlin in *Commissioners of Inland Revenue v Duke of Westminster*[4] at p 19 that 'every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be'. Such genial spirit
H can be contrasted with the rather critical attitude of Viscount Simon LC in *Latilla v Inland Revenue Commissioners*[5] who at p 381 described such kindred ingenuity as a 'not commendable exercise of ingenuity'.

In *Latilla*,[5] s 18 of the Finance Act 1936 of the United Kingdom was enacted for the prevention of avoidance of income tax by tax-payers trans-
I ferring their assets to persons resident outside the United Kingdom so that income became payable to persons resident outside the United Kingdom.

To avoid this avoiding Act, the tax-payer there transferred her share in a mining partnership to a company incorporated in the then Rhodesia and

that Rhodesian company, in consideration therefor, issued shares and non-interest bearing debentures in her favour. No dividend was ever declared on shares issued to her but instead the Rhodesian company applied its profit received from the mining firm by redeeming the debentures issued to her. The tax-payer was assessed for income tax for her original share of profit in the mining firm paid to the Rhodesian company by the mining firm. The assessment was upheld by the special commissioners, by the High Court, the Court of Appeal and finally the House of Lords which found against her, inter alia, stating that the redeeming of the debentures might serve as a means of transferring the profit of the mine in the form of capital.

The prominent issue argued there was that the avoidance of British taxation was not the main purpose of those arrangements and that they were a bona fide commercial operation not designed for the purpose of such avoidance.

Now that English case above was of course not concerned directly with the validity of those documents or transactions but with the validity of the assessment of tax, nevertheless the upholding of the assessment involved necessarily the rejection as unlawful those transactions of the tax-payer with the Rhodesian company, and in that case the tax-payer there never said that she had done all that to avoid paying income tax.

Section 24 of the Contracts Act 1950 provides as follows:

> The consideration or object of an agreement is lawful unless —
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> (a) it is forbidden by a law;
> (b) it is of such a nature that, if permitted, it would defeat any law;
> (c) it is fraudulent;
> (d) it involves or implies injury to the person or property of another; or
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

Before dealing further with the said s 24 of the Contracts Act 1950, it should be emphasized that all the relevant documents drawn up on the advice of the tax consultant firm have all emanated from the euphemistically-called estate duty planning scheme which, if it is found to be illegal, would render all the said documents tainted with illegality and unenforceable.

In addition to the large number of local cases on illegality, it would be helpful to refer to an English case more akin to our instant one.

In *Alexander v Rayson*,[6] the defendant agreed to take a lease in Piccadily for £1,200 pa. However, the plaintiff, ie the lessor, sent two documents for her signing, one being the lease of the flat at £450pa and another document for services of the lessor at £750pa. The services agreement referred to services practically the same as already provided for in the lease except the provision of a refrigerator and its maintenance. The two sums payable under the two documents totalled the sum of £1,200pa.

When the defendant was sued subsequently for the money due on these two documents, the defendant pleaded illegality and the court found that

A only the lease with rent at £450pa was produced to the Assessment Committee of the City Council there for reducing successfully the flat's rateable value. The Court of Appeal held that illegality was established and the court would not assist the plaintiff in enforcing these documents.

There seems to be some difficulty in drawing the line between the dictum of Lord Tomlin and that of Viscount Simon LC but in our view, the B real test seems to be, in any given transaction, whether the primary purpose of the transaction is to avoid tax; if it is, it is an illegal purpose, ie of such a nature that, if permitted, it would defeat the tax law in question, coming under sub-s (b) of s 24 of the Contracts Act 1950.

In our opinion, the primary purpose of the scheme was to avoid paying C estate duty, especially bearing in mind that the said land would practically remain with members of the immediate family of the landowner in the sense that the children and wife of the landowner would control exclusively the holding company without their having paid one cent towards the purchase price of the said land. The scheme was therefore illegal.

When the issue of illegality was raised, we have lifted the corporate veil D of each company wherever we have found it necessary, for it is well settled that the courts have a discretion to lift it for the purpose of discovering any illegal or improper purpose, eg see (1) *Gilford Motor Co Ltd v Horne*[7] in which the defendant, a former employee of the plaintiff, had covenanted not to solicit the plaintiff's customers. The defendant sought to avoid this E by forming a company to solicit. Both the defendant and the company were restrained by injunction; and (2) *Jones v Lipman*[8] in which the defendant sought to avoid completing the sale of his house to the plaintiff by conveying it to a company formed for the purpose. Both the defendant and his company were ordered to specifically perform the contract.

Our conclusion thus disposes of the appeal without the necessity of F dealing with other issues canvassed before us.

We therefore hold that the agreement of sale and purchase of the said land dated 1 April 1985 and the subsequent trust deed dated 26 April 1986 are unenforceable. The appeal is therefore allowed and the order of the learned judge set aside. The respondent would have to pay costs to the G appellant to whom the deposit for security for costs is also to be refunded.

Appeal allowed.

Reported by Prof Ahmad Ibrahim

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